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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1709

JOHN R. HENRY, JR.,
Respondent,
v.
AMALIE SNEIDERS, and AMALIE SNEIDERS
as personal representative of the Estate of
MAKSIS SNEIDERS, deceased,
Petitioner.

REPLY TO RESPONDENT'S BRIEF ON PETITION FOR WRIT OF CERTIORARI

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SUBJECT INDEX

	Page
Respondent Has Failed to Answer Petition	1
Reply to Respondent's New Material	3
No Hearing on Validity of Claim of Privilege	3
Summary of Argument	3
Argument	4
Time of Claiming Privilege	5
Disclosure to Investigators Does Not Waive Privilege at Trial	7
Summary of Argument	7
Argument	7
There Has Been No Waiver	10
Answer to the Impeachment Argument	11
Answer to Argument on Petitioners Holding Records in Representative Capacity	12
Reference to Contumacious Bahavior	13
Answer to Argument of No Penalty	13
Fifth Amendment Not Restricted to Criminal Cases	14
Contents of Orders Never Revealed	14
Answer to Respondent's Summary	14
Conclusion	16

TABLES OF AUTHORITY

Table of Cases

Couch v. United States, 409 U.S. 322, 93 S. Ct. 611, 34 L. Ed. 2d 584 (1973) 7-8

Goitzbach v. Klavans, 196 F. Supp. 5 (E.D. Va. 1961) 8, 9

Hoffman v. United States, 341 U.S. 479 (1951) 5

Maness v. Meyer, Cause No. 73-689, now pending 2, 17

Page

Mason v. United States, 244 U.S. 362 (1917) 5

Rogers v. United States,
340 U.S. 367 (1950) *reh. den.*, 341 U.S. 912 5

United States v. Kordel, 397 U.S. 1,
25 L. Ed. 2d 1 (1970) 13, 14

United States v. White, 322 U.S. 694 (1944) 13

Constitutional Provisions

U.S. Const. amend. V ..... 2, 3, 4, 5, 6, 7, 8, *et seq.*

Other Authorities

Fed. R. Civ. P. 26(b)(1) 16

Fed. R. Civ. P. 26(c)(8) 12

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RESPONDENT HAS FAILED TO ANSWER PETITION

Respondent makes no attempt to justify the opinion of the Court of Appeals. The opinion of the Court of Appeals is devoid of any citations of authority for it's new revolutionary doctrine that petitioner's husband's prior disclosure of potentially incriminating private records waives petitioner's Fifth Amendment privilege with the result that she can be punished for refusing to obey an order to produce those records. We have been unable to find any authorities sustaining that doctrine. Respondent cannot furnish any either.

As the case law now stands, five of the second highest appellate courts in the United States have ruled that a waiver of the Fifth Amendment privilege must occur in the same proceeding in which it is invoked. (See example quotations on pages 13 and 14 of Petition herein) Now, in this case, one court of equal rank rules exactly to the contrary.

Respect for law and judicial processes will not long endure in the face of such a flagrant conflict on such a basic fundamental cornerstone of our whole concept of freedom. One's rights must not be dependent upon the judicial circuit of his residence. It is respectfully suggested that this court has an obligation to quickly resolve this conflict.

The opinion of the Court of Appeals in this case goes even further and holds that a stranger (in this case petitioner's husband) somehow has the authority to destroy petitioner's Fifth Amendment privilege. We have been unable to find any record of a case where such a theory has even been advocated, and certainly no case where it has been followed. Respondent has not supplied any authorities to sustain the opinion of the lower court either.

The thrust of this new theory, relied upon in the opinion below, is exactly the same rationale as followed in the lower court in *Maness v. Meyers*, Cause No. 73-689 now pending in this court, *i.e.*, that prior disclosure to anyone destroys the Fifth Amendment privilege—in other words, that a disclosure of privileged evidence to anyone waives the privilege in all proceedings with the result that a court has the legal authority to compel an accused or a witness to produce such evidence. These two cases present identical issues and should be decided together.

REPLY TO RESPONDENT'S NEW MATERIAL

We recognize that this is not the place to review the complete record but that such chore should be reserved for the opening brief on appeal. However, there are many distortions and outright inaccuracies in respondent's brief which are obviously designed to influence the court adversely on the question of granting certiorari, on the theory that justice has prevailed even though the reasons for the Court of Appeals' decision cannot be sustained. At the risk of insulting the intelligence of members of the court, we will point out some of the most glaring misstatements, even though they may be obvious. Petitioner has requested the Clerk of the Court of Appeals to transmit the record to this court. Presuming this has been done, reference will be made to that record herein.

NO HEARING ON VALIDITY OF CLAIM OF PRIVILEGE

Summary of Argument

A stranger to the record could easily be misled by respondent's brief into believing that the trial judge held a hearing on the validity of petitioner's Fifth Amendment privilege, when, in fact, no such hearing was ever held. On page 10 of respondent's brief, an argument is made to the effect that the trial judge took into consideration all circumstances, but the fact is the order to produce incriminating records was *sua sponte* without any evidence, so there was never a forum in which petitioner could present her evidence.

Petitioner's affidavit of September 15 (Appendix E to the Petition herein) was filed when it became apparent

the trial judge was never going to afford petitioner a hearing. It contains all the evidence ever before the court on this issue.

ARGUMENT

The trial judge's home jurisdiction was the District of Oregon, but somehow he was assigned to hear this case in Seattle. All communications with the trial judge were by mail until April 5, 1971. A few days prior to that date, counsel were advised by phone that the trial judge would like to see them on that date. No motions of any kind were pending. On March 19, 1971, a request pursuant to Rule 34 had been served upon petitioner's counsel to produce virtually all of petitioner's records for inspection. The rule did not require petitioner to respond to that request until April 19, 1971, and petitioner had not done so by April 5, 1971.

On that date, without the remotest pretext of a hearing, the trial judge *sua sponte* orally ordered petitioner's counsel to produce all petitioner's private, personal records for inspection. There was no opportunity to present any evidence in support of her claim of privilege by affidavit or otherwise. The trial judge instructed that a form of order be served upon petitioner's counsel, which was done. However, petitioner's counsel filed written objection to that order and as a result, such order was never signed. Thereafter, the trial judge continually asserted orally that he had already ordered the records produced and therefore petitioner was in contempt for not obeying the order.

Because there never was a hearing on the issue of whether petitioner had a valid and good faith claim to assert the Fifth Amendment privilege, the record in this case is com-

pletely devoid of any findings of fact to support any legal conclusion as to whether the petitioner had a valid right to claim her Fifth Amendment privilege. The cases relied upon by respondent, *Mason v. United States*, 244 U.S. 362 (1917); *Hoffman v. United States*, 341 U.S. 479 (1951), and *Rogers v. United States*, 340 U.S. 367 (1950) *reh. den.*, 341 U.S. 912, all contemplate a hearing on the factual issues. Although no such hearing was ever held, the trial court did orally assert that petitioner had a good faith claim of the Fifth Amendment on August 9, 1971, as quoted on page 9 of the Petition herein.

Therefore, there is no merit in respondent's assertion that the trial judge took any circumstances into consideration. Further, it should be pointed out that the decision in the Court of Appeals does not mention or rely upon any such hearing or finding of fact. We have no quarrel with respondent's authorities that the trial judge should conduct an inquiry on the facts as to whether the Fifth Amendment may properly be invoked. But those authorities are not applicable because the trial judge did not hold such a hearing.

TIME OF CLAIMING PRIVILEGE

Throughout respondent's brief, it is asserted that petitioner's affidavit of September 15, 1971, is her first claim of Fifth Amendment privilege. This is an inaccurate statement.

The truth of the matter is the record shows that the Fifth Amendment privilege was first raised by motion served and filed on December 21, 1970, ten days after the indictment in the criminal case was returned. (Rec. pp. 138-140) That motion claims the privilege as to all discovery. The request

for production of the potentially incriminating, private, personal records was not made until three months later in March of 1971. Petitioner's privilege was very much in issue on April 5, 1971, the first time the trial judge appeared in Seattle. On page 5 of the transcript of those proceedings, respondent's counsel acknowledged the Fifth Amendment privilege issue in the following language:

> MR. HECKENDORN: "So it seems to me, at least, that the hiding behind the 5th Amendment at this stage is a complete facade and all it does is delay the action . . ."

The privilege is also discussed by petitioner's counsel or the trial judge on pages 21, 23, 24 and 30 of that transcript.

The quotation from the transcript of the proceeding on July 9, 1971, as set out on page 7 of the Petition herein, further shows that the privilege was brought to the court's attention on that date.

The trial judge acknowledged that petitioner's claim of the Fifth Amendment privilege was in "good faith" on August 9, 1971. (See quote on page 9 of the Petition herein.)

It is true that petitioner did not *personally* assert her Fifth Amendment privilege until September 15, 1971. However, there was no opportunity or occasion for her to personally assert her privilege until it became obvious that the trial judge was never going to afford her a proper hearing to be present or present evidence in any form. It must be pointed out that the affidavit of September 15, 1971, was served and filed before the order of default was entered on October 19, 1971, (Exhibit "F" to Petition herein) so the trial judge was well aware of the facts before he entered

the default. Attention is invited to the fact that the trial court completely ignored the claim of the Fifth Amendment privilege in that order as in all other orders.

Therefore, the emphasized statement on page 7 of respondent's brief that petitioner did not assert her Fifth Amendment privilege until September 15, 1971, is an inaccurate representation of the record.

DISCLOSURE TO INVESTIGATORS DOES NOT WAIVE PRIVILEGE AT TRIAL

Summary of Argument

Under all prior authorities, Maksis Sneiders would have the right to assert his Fifth Amendment privilege even if he had survived. Disclosure of records to an investigative officer does not waive the privilege to refuse to produce those records at a trial. The conduct of Maksis Sneiders could not possibly destroy the personal Fifth Amendment privilege of his surviving widow. The decision of the Court of Appeals here is in direct conflict with all such prior authorities.

Argument

On pages 8 and 9, respondent's brief asks the court to deny certiorari for the reason that by deposition Maksis Sneiders testified concerning the private, personal records respondent now contends the trial court could lawfully order petitioner to produce and argues that such testimony by Maksis Sneiders is a waiver of petitioner's personal right to claim the Fifth Amendment privilege.

This argument must fail for two reasons:

(a) The right to claim one's Fifth Amendment privilege is personal. *Couch v. United States*, 409 U.S. 322, 93 S.

Ct. 611, 34 L. Ed. 2d 584 (1973). Petitioner, Amalie Sneiders, was never deposed or otherwise testified concerning, or produced, the records in question. She made a timely claim of privilege through her counsel by motion on December 21, 1970 (Rec. 138-140). Thereafter, her counsel continuously and repeatedly asserted her Fifth Amendment privilege on her behalf. Finally, by affidavit on September 15, 1971 (Appendix E to Petition herein) she personally asserted the privilege.

(b) Petitioner's privilege could not possibly be waived by her husband answering questions during his deposition as to the existence of the records nor could her husband waive her privilege by turning over copies of the records to the United States Attorney during the course of the latter's investigation. It was not petitioner's acts or conduct but rather her husband's acts upon which respondent relies in support of his assertion of waiver. Respondent has not furnished a single citation of authority in support of the proposition that a third person may waive another's personal privilege of the Fifth Amendment. Petitioner has been unable to find any such authority either.

Moreover, the production of the records by Maksis Sneiders for inspection by the United States Attorney's staff conducting the investigation would not even constitute a waiver of Maksis Sneiders' Fifth Amendment right to refuse to testify or produce that same physical evidence in any subsequent proceeding. In a decision squarely in point, *Glotzbach v. Klavans*, 196 F. Supp. 685 (E.D. Va. 1961), Klavans permitted agents of the Internal Revenue Service to examine his tax books and records. After two days of examination by the agents, Klavans refused to permit them

to see the books again. The District Court held that Klavans knowing and voluntary permission given to the agents constituted a waiver of his Fifth Amendment rights for inspection, and inspection only, and that such waiver continued for a reasonable time. However, with regards to production of those records for any other purpose, the court squarely ruled that Klavans retained his constitutional privilege. The opinion states at pages 687 and 688:

> "We are not concerned with the question of immunity relating to the use of material provided voluntarily in one proceeding, but objected to in a prosecution under another proceeding. [citations omitted] Should it develop that Klavans is subsequently prosecuted, it is clear that he cannot be required to produce the records at the trial which he previously permitted the agents to examine."

Glotzbach v. Klavans has never been overruled but has been cited, and relied upon by numerous courts and accurately states the law. Under that authority, Maksis Sneiders would have been in exactly the same position as Klavans, had he survived.

By voluntarily providing the records for inspection by the United States Attorney, Maksis Sneiders did not waive his Fifth Amendment privilege to refuse to produce those same records at any subsequent proceeding. No court could lawfully compel him to be a witness against himself by producing those records.

The petitioner here is a giant step removed from the position of Maksis Sneiders. No claim is made that she has done anything which could constitute a waiver. Neither osmosis nor guilt by association can possibly visit the alleged sins of her husband upon her.

Where, then, does the lower court acquire the lawful authority to deny the petitioner the right to exercise her Fifth Amendment privilege? Certainly such authority cannot flow from the fact that she is Maksis Sneiders' surviving widow, or from her being appointed executrix of his estate. She has been placed in jeopardy by being indicted once, and the statute of limitations has not expired for her being reindicted. She has possession of the records. All the authorities confirm that she has the right to refuse to produce those records, except the Court of Appeals in this case.

THERE HAS BEEN NO WAIVER

By inference and innuendo, respondent attempts to mislead this court into believing that the incriminating records were already in the hands of the prosecutor in usable form. This is not true. As shown by petitioner's affidavit (Appendix E to Petition herein) the prosecuting authorities were not permitted to inspect or copy any records until they had first agreed that by so doing petitioner and her husband were not waiving their Fifth Amendment privileges. Therefore, although the prosecuting authorities may have knowledge of the contents of the records, they had no way of using those records as evidence and certainly cannot compel petitioner to produce them.

If petitioner could be forced to produce those records in the *civil* action, then the prosecutor could present that secondary evidence as an admission in a criminal prosecution. If the prosecutor could have found some lawful way to acquire possession of the records, in a form in which he could use them in the prosecution's case in chief, he could have used them against petitioner. However, the thrust of the Fifth Amendment, whether in a civil case or a criminal

case, is that the witness or accused cannot be compelled to produce evidence, oral or documentary, which will furnish a link in evidence needed to obtain a conviction.

Therefore, the prior disclosure to the prosecuting authorities did not constitute a waiver of the Fifth Amendment privilege, and even if it had, under the law of the First, Second, Third, Fourth and Fifth Circuits, that waiver would not have been effective in this separate civil proceeding.

ANSWER TO THE IMPEACHMENT ARGUMENT

Effort has been made in respondent's brief to mislead the court that petitioner's counsel somehow waived petitioner's Fifth Amendment privilege by arguments that he intended to use the records for impeachment purposes. In the first place, this is a falacious argument, as counsel cannot waive his client's constitutional privilege. Only pettitioner can do that by her personal conduct.

Secondly, the argument regarding the use of the records for impeachment was an alternate reason for refusing to produce the records for inspection. The local rules for the United States District Court for the Western District of Washington provide that documents intended to be used solely for purposes of impeachment shall be sealed in an envelope and marked by the clerk for identification, and thereafter may be received in evidence solely for impeachment. Since the discovery proceedings have shown that respondent could not produce any evidence on the description of the merchandise he ordered, he would be hard put to prove that the merchandise he received was different in quality or description from that which he ordered, in either the criminal or the civil case. If respondent, in either the

civil or the criminal case, asserted he had ordered stamps which he had in fact not ordered, the records of his orders would then become useful for impeaching his testimony.

However, that argument was not in any manner a waiver of the petitioner's Fifth Amendment privilege.

It is true, however, that petitioner's counsel did attempt to work out a compromise as contemplated by Rule 26(c)(8) whereby both parties would be required to submit all of their documentary evidence simultaneously under an order that neither party could inspect the other party's documents until all records had been so submitted. Respondent's adamant refusal to participate in any such arrangement raises a suspicion that he was attempting to recover his losses in purchasing forged stamps from stamp dealers other than petitioner's husband.

Therefore, there is no merit whatever in the assertion that petitioner waived her Fifth Amendment privilege because her counsel argued a theory, contemplated by court rule, of withholding documents for impeachment and tried to work out a compromise as contemplated by Rule 26(c)(8).

ANSWER TO ARGUMENT ON PETITIONER HOLDING RECORDS IN REPRESENTATIVE CAPACITY

On page 10 of respondent's brief, it is asserted that petitioner held her records in a representative capacity. Although petitioner was substituted as a party defendant for Maksis Sneiders, in her capacity as executrix, she was also a party to the action in her own right. The judgment runs against her personally as well as the estate. Under the community property laws of the State of Washington, she

owned an undivided one half interest in those records and had just as much right to possession as her husband. She was personally indicted. Her possession of the records was not by reason of her appointment as executrix. She had the right to assert her personal constitutional privilege.

Under no circumstances could she be held to be holding those records in a representative capacity as contemplated by the decisions of this court. The records were not held as a representative of a union as in *United States v. White*, 322 U.S. 694 (1944) nor as an officer of a corporation, as in *United States v. Kordel*, 397 U.S. 1, 25 L. Ed. 2d 1 (1970).

REFERENCE TO CONTUMACIOUS BEHAVIOR

Throughout respondent's brief and the record herein, respondent's counsel has frequently characterized the behavior of petitioner and her counsel as "contumacious." This record is devoid of any remark of any kind impuning the integrity of the trial judge or the court. The so called "contumacious behavior" consists solely of refusing to obey an illegal order of the trial judge directing petitioner to produce her private, potentially incriminating records for inspection and relying upon her Fifth Amendment privilege.

ANSWER TO ARGUMENT OF NO PENALTY

On page 11, respondent's brief argues that there was no penalty imposed upon petitioner for asserting her Fifth Amendment privilege. The court is reminded that petitioner was denied the right to a trial on the issue of liability. That is a very severe penalty. The fact that she was permitted to make a partial attempt to present evidence on the issue of damages does not cure that penalty.

FIFTH AMENDMENT NOT RESTRICTED TO CRIMINAL CASES

On page 11 respondent argues that petitioner's citations from other circuits all pertain to criminal cases and are therefore not in point, but supplies no authority in support of that argument. The Fifth Amendment privilege is as available in a civil case as in a criminal case, and the law pertaining thereto is the same. See *United States v. Kordel*, 397 U.S. 1, 25 L. Ed. 2d 1, 90 S. Ct. 763 (1970).

CONTENTS OF ORDERS NEVER REVEALED

On page 8, respondent's brief attempts to inform the court on the contents of the records petitioner refused to produce. Since petitioner has never produced the records, respondent has no knowledge of any additional notations petitioner's husband may have made on those records or what purposes they serve. Respondent may have some memory of the records as he last saw them, but he certainly has no information of their present condition, and there is no evidence in this record as to the present contents of the records. However, it should be obvious that those records would be a link in a chain of circumstances necessary to convict, should the United States Attorney elect to reindict the petitioner.

ANSWER TO RESPONDENT'S SUMMARY

On page 12, respondent's brief argues that if the petitioner has a Fifth Amendment privilege, then criminals and those who claim they might be criminals have special advantages in civil suits over law abiding citizens.

This is but another version of the complaint of the misinformed that the Fifth Amendment privilege was created

to enable the guilty to escape punishment. Those who have studied the history of the Fifth Amendment recognize that it has its origins in the protection of the innocent dating back to the days of the inquisition, and its purpose remains the same today.

To accept the basic fundamental principal of the Fifth Amendment, and the freedom it insures, one must also be prepared to accept the fact that in some instances the guilty will also escape. We mortals are imperfect, and therefore our institutions are imperfect. However, history has proven that our concept of freedom, founded primarily upon the Fifth Amendment, is the more desirable of the opposing philosophies.

Unless respondent is advocating a change in the Constitution, his argument must be rejected.

In this instance, however, it must be recognized that respondent finds himself without any evidence to prove the description of the stamps he ordered solely through his own negligence. It would have been a simple matter for him to have kept copies of the some $72,000.00 worth of orders he sent petitioner's husband. If, in fact, he failed to do so, this court should not be called upon to change the Constitution to assist him.

Respondent's summary further asserts with pride the statement of the trial judge characterizing petitioner's conduct as "obstinate refusal to cooperate with the discovery rules".

Both the trial judge and the respondent misconceive

the purpose of the discovery rules. Rule 26(b)(1) admonishes that discovery is limited to matters which are not privileged in the following language:

> "Parties may obtain discovery regarding any matter, *not privileged* . . ." (Emphasis supplied)

It should also be noted that the discovery rules contemplate circumstances which may very well be present here, where one party is seeking to perpetrate a fraud upon the other by inspection of records before being required to produce his own evidence. Rule 26(c)(8) provides a procedure for both parties to simultaneously submit their records for inspection. Respondent adamantly refused to consider an offer to resolve his dilemma under that rule.

CONCLUSION

Petitioner has shown in this reply brief that respondent has utterly and completely failed and refused to supply any authorities or rationale as to why this court should not grant certiorari to resolve the intolerable conflict between the opinion of the Court of Appeals in this case, and the settled law in all other jurisdictions, including but not limited to the decisions of the First, Second, Third, Fourth and Fifth Circuits, where it has heretofore been considered. It does not appear that the Sixth, Seventh, Eighth and Tenth Circuits have considered the issue.

Equally as important, petitioner has shown that the Court of Appeals in this case has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

The respondent's answering brief is primarily devoted to arguments that the result reached by the court of Appeals

is just, even though it cannot be supported by any legal authorities, and therefore this court should deny certiorari. Petitioner suggests such an argument is not a valid basis for denying certiorari.

Since the legal issues presented in the *Maness* petition, Cause No. 73-689 now pending in this court for argument, are identical with the issues here, granting certiorari is not likely to increase this court's work load, particularly, if the cases are consolidated as originally suggested in the petition submitted herein.

Respectfully submitted,

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